SUPPLEMENTARY APPENDIX

# United States Court of Appeals

## For the First Circuit

---

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

*v.*

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

---

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

---

BILLY R. OTTE,
DEFENDANT-APPELLANT.

---

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

---

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges.*

---

*Timothy H. Gailey*, with whom *Mark N. Polebaum*, and *Hale and Dorr* were on brief, for Watts Detective Agency, Inc., et al.

*James F. Freeley*, with whom *Feeney & Freeley* was on brief, for Daniel Sullivan.

. . . . . .

We now turn to the issue of Sullivan and Otte's liability under Count I. Although not raised by either of them below or before us, we think that under these facts there can be no liability as a matter of law because neither Sullivan nor Otte received any of the fraudulently transferred property.[10] The Act contemplates recovery by the trustee only from recipients of fraudulently transferred property.

Our ruling is informed by the reasoning of the Ninth Circuit in *Elliott* v. *Glushon*, 390 F.2d 514 (9th Cir. 1967), which held that the trustee in bankruptcy could not recover the value of fraudulently transferred property from an attorney who had acted only as an escrow holder and attorney for certain participants in the admitted transactions but had never received any of the property involved. In reaching its conclusion, the court first examined the pertinent sections of the Bankruptcy Act and noted that they "suggest with some certainty that recovery may be had only against persons who have received the property in question." *Id.* at 515. Section 67(d) provides that a transaction found to be fradulent shall be "null and void against the trustee. . . ." 11 U.S.C. § 107(d)(6). Section 70, which vests title in the trustee to, *inter alia*, property fraudulently transferred by the bankrupt, 11 U.S.C. § 110(a)(4), gives the trustee his procedural rights to enforce section 67(d) and provides that if a transfer is made which is fraudulent under any applicable federal or state law, "[t]he trustee shall

---

[10] Because this issue was not raised below, we would ordinarily not consider it for the first time on appeal. *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (1st Cir. 1979). We recognized, however, in *Dobb* v. *Baker*, 505 F.2d 1041 (1st Cir. 1974), that we might deviate from this rule where the new ground for reversal is "so compelling as virtually to insure appellant's success." *Id.* at 1044. Here, the issue turns on an open and shut question of law.

reclaim and recover such property or *collect its value from* and avoid such transfer . . . against *whoever may hold or have received it*. . . ." 11 U.S.C. § 110(e)(2) (emphasis added).

Noting a conflict among a few earlier cases and distinguishing the leading one,[11] the *Elliott* court acknowledged the temptation to borrow from the principle of joint liability among tortfeasors in order to permit recovery against a nonrecipient. It nonetheless held that the purpose of sections 67(d) and 70 of the Act

> is clearly to preserve the assets of the bankrupt; they are not intended to render civilly liable all persons who may have contributed in some way to the dissipation of those assets. The Act carefully speaks of conveyances of property as being "null and void," and authorizes suit by the trustee to "reclaim and recover such property or collect its value." The actions legislated against are not "prohibited"; those persons whose actions are rendered "null and void" are not made "liable"; and terms such as "damages" are not used. The legislative theory is cancellation, not the creation of liability for the consequences of a wrongful act.

*Id.* at 516 (footnote omitted).

Moreover, the court reasoned, the trustee may still have a right of action for fraud or deceit under state law against those who participated in the transaction. Recovery under the Bankruptcy Act, however, embraces only the recipients of the

---

[11] *Brainard* v. *Cohn*, 8 F.2d 13 (9th Cir. 1925), a case decided over four decades before the same circuit, permitted recovery against a nonrecipient of fraudulently transferred property. In that case, however, a conspiracy had been alleged, and the court held full recovery to be proper against a conspirator who received some but not all of the transferred merchandise. Central to that decision was the fact that the conspirators had intermixed the bankrupt's property with their own. *Id.* at 15.

transferred property. We believe this analysis is correct and adopt it, as other courts have done. *See, e.g., Klein* v. *Tabatchnick*, 610 F.2d 1043, 1048 n.4 (2d Cir. 1979); *Jackson* v. *Star Sprinkler Corp.*, 575 F.2d 1223, 1234 (8th Cir. 1978). *See also In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 339 (9th Cir. 1978).

The judgments against Sullivan and Otte on Count I must be reversed. This makes it unnecessary to discuss their claim that there was no evidence that they actively participated in any transfer of the assets of Sullivan Company, which, we note, is untenable as to Otte.

*Claimed Trial Errors*

The Watts appellants claim first and foremost that Sullivan's opinion as to the value of Sullivan Company was erroneously admitted into evidence. Sullivan was permitted to testify that, in his opinion, the business was worth approximately one million dollars at the time of the transfer to Watts. He relied in part for this opinion on his understanding that service businesses such as his are valued at one dollar for each dollar of annual gross sales. Because Sullivan Company had accounts worth one million dollars as of April 1970, this was the figure he used.

The district court permitted Sullivan to testify to his opinion on the value of the business because, as president and majority stockholder, he was the owner of the property. The court noted that this opinion testimony of an owner is admissible

> either as an opinion by a lay witness "based on . . . personal perception" and "helpful to a clear understanding of his testimony of the determination of a fact in issue" under [Federal] Rule [of Evidence] 701, or as an expert opinion by one who is "qualified as an expert by knowledge . . . [or] experience" under Rule 702.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE IN BANKRUPTCY OF
D. C. SULLIVAN & CO., INC.,
PLAINTIFF,
*v.*
WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS.

ORDER AND MEMORANDUM OF DECISION
August 28, 1981

NELSON, D.J.

The trustee in Bankruptcy of D. C. Sullivan & Co., Inc. ("Sullivan Company") brought this action to recover the value of certain of the bankrupt's assets that were allegedly misappropriated. Named as defendants were Watts Detective Agency ("Watts"), the alleged recipient of the bankrupt's assets; Consolidated Service Corporation ("Consolidated"), Watts' parent corporation; Christopher P. Recklitis ("Recklitis"), the President of both Watts and Consolidated; and David C. Sullivan ("Sullivan") and Billy R. Otte ("Otte"), the bankrupt's President and Vice-President. The Trustee proceeded against these defendants under the following three theories of liability alleged in the complaint under separate counts. First, that not more than one year prior to Sullivan Company's bankruptcy, and while Sullivan Company was insolvent or so as to render it insolvent, they caused certain of its assets to be transferred to Watts for less than fair consideration, in violation of former 11 U.S.C. § 107(d)(2)(a).[1]

[1] [sic]

. . . . . .

Finally, it remains to treat of the separate arguments of defendant Otte and Sullivan. Defendant Otte essentially only adopts the arguments of defendants Watts, Consolidated and Recklitis. As those defendants did not address themselves to liability under Count III, and as the other arguments of those defendants have already been dealt with, defendant Otte's liability under Count III can only be sustained.[6] Turning to the motion of defendant Sullivan, he too basically adopts the arguments of his co-defendants. The only new arguments he advances pertain to Count III, under which he argues both that the evidence was insufficient to connect him with the fraudulent transfer scheme of defendants Watts, Consolidated, Recklitis and Otte and that the verdict against him (and Otte) on Count III is inconsistent with the verdict on that count for defendants Watts, Consolidated and Recklitis. The second argument may be dismissed summarily. No authority is cited by Sullivan for the proposition that a verdict supported by sufficient evidence is to be overturned and a judgment for the moving party entered simply because the jury did not find against other defendants which found against him. Indeed, while verdict inconsistency is sometimes a ground for the awarding of a new trial, *see infra*, the sole issue on a motion for a judgment notwithstanding the verdict is the sufficiency

---

[6] By adopting the arguments of co-defendants, Otte preserves those arguments only to the extent they were made. While defendants Watts, Consolidated and Recklitis argued that there was insufficient evidence of the existence of property or of a transfer of such which diminished the estate in value, *they* did not argue that even if there was sufficient evidence as to these two factors that that would not rise to the level of a breach of fiduciary duty under Count III, and thus *Otte himself* may not be heard to so argue. Given the nature of an officer's fiduciary duty to his corporation, *see infra*, the argument that participation in a fraudulent transfer under the Bankruptcy Act is not violative of that duty would be rather unlikely to prevail. In any event, since it is held above that there is sufficient evidence to sustain the jury's verdict against Otte under Count I, it is legally irrelevant whether there is also sufficient evidence to sustain its verdict against him under Count III.

of the evidence and the law to support the verdict as it concerns the moving party only. *Garrison* v. *U.S.*, 62 F.2d 41, 42 (4th Cir. 1932); *see generally*, 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2531 (1971). And as to the sufficiency of the evidence, the jury could reasonably have found that Sullivan breached his fiduciary duty to the bankrupt by participating in a transfer of the corporation's property without fair consideration at a time when the corporation was insolvent. The evidence showed that defendant Sullivan was President and a director of the bankrupt. "The directors of a commercial corporation stand in a relation of trust to the corporation and are bound to exercise the strictest good faith in respect to its property and business." *Goodwin* v. *Agassiz*, 283 Mass. 358, 361 (1933). They have "a duty of reasonably protecting and conserving its interests." *Lincoln Stores, Inc.* v. *Grant*, 309 Mass. 417, 421 (1941). The jury could reasonably have found Sullivan not to have lived up to his legal duty even though his failure to do so was not motivated by a desire for personal profit. This was not the usual case of double-dealing or other conflict of interest. Nonetheless, there was evidence that Sullivan had been a party to earlier attempts by defendants Watts and Consolidated through their President, defendant Recklitis, to purchase the bankrupt for valuable consideration, that those efforts had culminated in the April 22, 1970 meeting to which the IRS was a party, that the result of that meeting was that the Recklitis was unwilling to pay the $50,000 which he had previously offered to purchase the bankrupt. The jury could reasonably have found that Sullivan then abandoned his fiduciary duty toward the corporation and, in his own words, "handed over the business" to Recklitis. There was thus sufficient evidence to find Sullivan liable under Count III.[7]

[7] In any event, as it is held above that there is sufficient evidence to find against Sullivan under Count I, Count III is unnecessary to sustain the judgment against him.

CIV 31
(7/63)40

Judgment on Jury Verdict

---

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

---

CIVIL ACTION FILE NO. 70-1336-N

DANIEL GLOSBAND, TRUSTEE ON BANKRUPTCY
FOR THE D.C. SULLIVAN COMPANY

*v.*

WATTS DETECTIVE AGENCY, INC.,
CONSOLIDATED SERVICE CORP.,
CHRISTOPHER P. RECKLITIS,
DANIEL SULLIVAN,
WILLIAM OTTE.

---

## JUDGMENT

This action came on for trial before the Court and a jury, Honorable David S. Nelson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

COUNT ONE: VERDICT FOR THE PLAINTIFF.
COUNT TWO: VERDICT FOR THE DEFENDANT.
COUNT THREE: DANIEL GLOSBAND *vs.* WATTS DETECTIVE AGENCY, INC.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* CONSOLIDATED SERVICE CORP.
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* CHRISTOPHER RECKLITIS
VERDICT FOR THE DEFENDANT.

DANIEL GLOSBAND *vs.* DANIEL SULLIVAN
VERDICT FOR THE PLAINTIFF.

DANIEL GLOSBAND *vs.* WILLIAM OTTE
VERDICT FOR THE PLAINTIFF.

THE PLAINTIFF HAS SUSTAINED DAMAGES IN THE AMOUNT OF $750,000.00.

Dated at Boston, Massachusetts, this 20th day of March, 1980.

(s) FRANCIS B. DELLO RUSSO
FRANCIS B. DELLO RUSSO
Dpy. Clerk of Court

# United States Court of Appeals
## For the First Circuit

Nos. 81-1697
81-1698
81-1699
81-1700

ROBERT ROBINSON,
TRUSTEE IN BANKRUPTCY OF D.C. SULLIVAN & CO., INC.,
PLAINTIFF-APPELLEE,

*v.*

WATTS DETECTIVE AGENCY, INC., ET AL.,
DEFENDANTS-APPELLANTS.

DANIEL SULLIVAN,
DEFENDANT-APPELLANT.

BILLY R. OTTE,
DEFENDANT-APPELLANT.

Before
CAMPBELL, BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT
Entered September 14, 1982

The petition for rehearing by Daniel Sullivan, defendant-appellant, is denied.

1. The district court properly assumed jurisdiction of the pendent state claim. The issue under Count I (fraudulent conveyance under the Bankruptcy Act) and the pendent state

claim of Count III (breach of fiduciary duty) "derived from a common nucleus of operative fact" and were so intertwined that "considerations of judicial economy, convenience and fairness to the litigants" required that they be tried together. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-26 (1966). This is not the situation of *Rice* v. *Fellows of Harvard College*, 663 F.2d 336, 339 (1st Cir. 1981), where the federal claim was dismissed prior to trial and the court ruled on the pendent state claim. The facts as to whether Sullivan or Otte (defendant-appellant) received any of the fraudulently transferred property could not be determined until after trial. We note that before us neither Sullivan nor Otte raised the issue of receipt of the fraudulently transferred property. Slip op. at 14.

2. The second half of appellant's petition is merely a rehash and reargument of the conclusions and inferences to be drawn from the evidence.

By the Court:
(s) DANA H. GALLUP
Clerk.

## ISSUES OF FACT

(5) The following are the issues of fact to be determined by the jury herein (defendants contend that there are no issues of material fact in this matter and that they are entitled to a judgment as a matter of law).

(a) As propounded by Plaintiff:

1. Exactly what was it that Recklitis was negotiating to buy from the Sullivan Company prior to April 22, 1970?

2. Considering all the evidence and circumstances, did the uninterrupted servicing of the Sullivan Company customers by its regular employees have a money value as of about 5:00 P.M. on April 22, 1970, and if so, what was its fair money value?

3. Was the Sullivan Company insolvent (within the definition of 11 U.S.C. § 107) before April 22, 1970, or did it become insolvent thereafter?

4. Did the individual defendants have the actual intent to hinder, delay or defraud either the existing or future creditors of the Sullivan Company by what they did in having Watts take over servicing the Sullivan Company customers with the Sullivan Company employees?

5. Did Otte and Sullivan breach their fiduciary duties to the Sullivan Company or its other officers, directors, or stockholders, and did Recklitis induce or participate in that breach?

6. If there was a breach of fiduciary duty for which the defendants are liable, was any damage caused by that breach, and if so, what was the money amount of such damage?

(b) As propounded by Defendants:

Defendants assert that there are no issues of material fact. Without waiving this contention, for the purpose of complying as nearly as possible with the Court's pre-trial order, defendants propound the following issues of fact:

1. After 5:00 P.M. on April 22, 1970 were Sullivan Company's employees and customers the property of Sullivan Company?

2. After 5:00 P.M. on April 22 could Sullivan Company pay its employees?

3. On and after April 22, 1970 was Sullivan Company able to continue as a going concern?

4. After 5:00 P.M. on April 22, 1970 was Sullivan Company's "good will" worth anything?

~~5. Was Watts free to offer to serve the customers of Sullivan Company after 5:00 P.M. on April 22, 1970?~~ 1 > FF

6. Was Watts free to offer to serve the customers of Sullivan Company after 5:00 P.M. on April 22, 1970?

7. Was any property owned by Sullivan Company transferred to Watts Detective Agency, Inc. on April 22 or April 23, 1970?

8. Did Otte and Sullivan have a duty to the Sullivan Company not to work for Watts after April 22, 1970?

9. Did Otte and Sullivan have a duty to the Sullivan Company not to help Watts to hire the former Sullivan Company employees after April 22, 1970 and not to help Watts to secure the business of the former Sullivan Company customers after April 22, 1970?